APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DATED AND DECIDED JANUARY 28, 1999

In the
United States Court of Appeals
For the Seventh Circuit

No. 98-2058

Katie R. Hardin,

Plaintiff-Appellant,

v.

S.C. Johnson & Son, Inc.,

Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Wisconsin.
No. 95-C-0944 — Thomas J. Curran, Judge.

Argued December 9, 1998 — Decided January 28, 1999

Before Flaum, Easterbrook and Diane P. Wood, Circuit Judges.

Flaum, Circuit Judge. Before us is Katie R. Hardin's ("Hardin") appeal from the district court's grant of summary judgment to S.C. Johnson & Son, Inc., ("S.C. Johnson") on her Title VII sexual and racial harassment claims and her 42 U.S.C. sec. 1981 claim. The district court adopted the

recommendation of Magistrate Judge Goodstein, who found that although Ms. Hardin was mistreated by an obnoxious co-worker, her case could not survive the defendant's motion for summary judgment. For the reasons discussed below, we affirm the district court's decision.

FACTS

Katie Hardin was hired by S.C. Johnson at its Sturtevant, Wisconsin plant as an hourly worker in 1972. Starting in 1988, she changed production lines, and began working with and for Nels Anderson. By all accounts, Anderson was a crude and boorish person, prone to offensive language and behavior. In the time they worked together, Anderson often used expletives, directed at Hardin and other workers, and berated them with statements like "get your head out of your ass" or "dumb motherfucker." Hardin also alleges that on numerous occasions, Anderson touched her. Although she says the touching lasted between a few and thirty seconds, her complaint does not specify where or in what manner Anderson touched her. A year after transferring to Anderson's line, Hardin and her coworkers complained to a supervisor, who told Anderson his profanity was inappropriate for the workplace.

Anderson apparently did not get the message, and continued using foul language and behaving crudely. Hardin proffers the affidavit of Anderson's ex-girlfriend, who stated that between 1991 and 1994, Anderson routinely referred to Hardin and other black women as "stupid black bitches," "stupid niggers," and "black cunts," although Hardin does not assert Anderson made such statements to her. Hardin

does offer evidence that Anderson continued to curse at her and other factory employees. In 1993 and again in 1995, Hardin complained to management about Anderson's behavior. Each time the company met with her, and responded to her complaints by reiterating its warnings to Anderson about his inappropriate behavior. S.C. Johnson also told Anderson to avoid the plaintiff unless he absolutely had to speak to her.

In her 1995 complaint to the company, Hardin asserted that she was being treated poorly because she was a black woman. In addition to the cursing and touching, she complained that Anderson startled her by driving up behind her in an electric cart without warning, letting a door slam in her face, and cutting her off in the parking lot. An investigation by S.C. Johnson's human resources director found that no other African-American employees believed they were being discriminated against on the basis of race, although it turned up evidence that a number of white men on the line felt they were mistreated by Anderson.

Additional complaints in 1995, including one to the president of S.C. Johnson, William Perez, resulted in Anderson being transferred to another production line. On June 1, Hardin learned that Anderson was temporarily re-assigned to work on her line during the June 3 overtime shift. Hardin opted not to work that day, a decision for which she was not penalized. Two days later, S.C. Johnson promised that they would rarely be assigned to the same line again, but that if that came to pass, Hardin would be informed ahead of time, and would be given the option to demur from working with Anderson.

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On June 13, 1995, Hardin filed a complaint with the Wisconsin Department of Industry, Labor and Human Relations' Equal Rights Division ("ERD"). She received a right to sue letter on September 8 of that year, and brought her cause of action. The magistrate judge ruled in favor of S.C. Johnson, and the district court approved of that decision. This appeal followed.

ANALYSIS

The district court's decision to grant summary judgment to the defendant is reviewed de novo. Chmiel v. J.C. Penney Life Ins. Co., 158 F.3d 966, 968 (7th Cir. 1998). It is appropriate only where the non-moving party fails to set forth specific facts showing that there is a genuine issue of material fact for trial. Fed. R. Civ. P. 56(e); Senner v. Northcentral Technical College, 113 F.3d 750, 757 (7th Cir. 1997). Although we must draw all reasonable inferences in Hardin's favor, NLFC, Inc. v. Devcom Mid-America, Inc., 45 F.3d 231, 234 (7th Cir. 1995), not every factual dispute creates a barrier to summary judgment. Only disputes that might affect the outcome of the suit under our precedent will properly preclude the entry of summary judgment. Derrico v. Bungee Intern. Mfg. Co., 989 F.2d 247, 250 (7th Cir. 1993).

With this standard in mind, we review the record to ascertain whether Hardin presented evidence giving rise to a triable claim. First, however, we must determine what of the evidence Hardin proffered we may use in reaching our ultimate conclusion.

Appendix A

I.

S.C. Johnson argues that Hardin is time-barred from relying on any evidence of harassment occurring prior to August 16, 1994 — 300 days before her complaint with the Wisconsin ERD. Under Title VII, a plaintiff has 300 days from the occurrence of an allegedly discriminatory act in which to file a timely charge either with the federal Equal Employment Opportunity Commission or the appropriate state agency — here the ERD. Generally, a plaintiff is only allowed to base a Title VII suit on conduct occurring within the limitations period. Galloway v. General Motors Service Parts Oper., 78 F.3d 1164, 1166 (7th Cir. 1996).

A particular exception to this is the "continuing violation doctrine" which this court has recognized on a multitude of occasions. Dasgupta v. University of Wisconsin Bd. of Regents, 121 F.3d 1138, 1139 (7th Cir. 1997); Galloway, 78 F.3d at 1166 (collecting cases). This doctrine is designed to "accommodate plaintiffs who can show that there has been a pattern or policy of discrimination continuing from outside the limitations period into the statutory limitations period, so that all discriminatory acts committed as part of this pattern or policy can be considered . . . timely." Peatzold & O'Leary, Continuing Violations and Hostile Environment Sexual Harassment: When is Enough, Enough?, 31 Am. Bus. L.J. 365 (1994).

When it would be unreasonable to expect the plaintiff to perceive offensive conduct as Title VII harassment before the limitations period runs, or the earlier discrimination may

only be recognized as actionable in light of "events that occurred later, within the period of the statute of limitations" the continuing violation doctrine applies. Galloway, 78 F.3d at 1167. The doctrine also may be used when, after an initial incident of discrimination, a plaintiff does not feel "sufficient distress to . . . mak[e] a federal case." Id. at 1166.

On the other hand, the continuing violation doctrine has delineated limits. Where a pattern of harassment spreads out over years, and it is evident long before the plaintiff sues that she was a victim of actionable harassment, she "cannot reach back and base her suit on conduct that occurred outside the statute of limitations." Id. at 1167; Doe v. R.R. Donnelley & Sons., Co., 42 F.3d 439, 446 (7th Cir. 1994). While a single comment may not be harassment, if the comment is repeated over a period of years, its cumulative effect likely precludes invocation of the doctrine. See Galloway 78 F.3d at 1167.

It is clear from Ms. Hardin's evidence that the continuing violation doctrine is inapplicable here. The evidence advanced in support of the plaintiff's motion for summary judgment shows that Anderson began directing rude and offensive behavior — brief touching, coarse language and statements to the plaintiff that she should move off of Anderson's line — toward Hardin in 1988. Hardin testified that she felt harassed as early as 1988. She verbally complained to management in 1989, and filed a written complaint with S.C. Johnson's human resources department in 1993. It is apparent that Hardin believed that she was a victim of harassment long before she filed her complaint with the Wisconsin ERD; it follows that it would

not have been unreasonable for her to seek redress for this conduct by filing before June 1995. Accordingly, in her Title VII claims, she may not reach back and rely on evidence occurring prior to 300 days before she filed her complaint. Her racial and sexual harassment complaints must stand or fall on conduct occurring between August 16, 1994 and June 12, 1995, although her 42 U.S.C. sec. 1981 claim has a six year statute of limitations.

For purposes of the Title VII claim, this eliminates the most damaging evidence of harassment by Anderson. These alleged racist statements to Brannon about the plaintiff happened prior to the limitations period, and thus are irrelevant. There are other problems with those proffered statements — they were made outside of the workplace, and Ms. Hardin admittedly knew nothing of them. We note, however, that were such noxious statements relevant to the record we considered — if in fact Anderson spoke them in the workplace or to Hardin's face within the limitations period — the thrust of this opinion could be markedly different.

II.

Title VII's ban on gender discrimination is violated when "discrimination based on sex . . . creates a hostile or abusive work environment." Meritor Savings Bank v. Vinson, 477 U.S. 57, 66 (1986). To make a claim under Title VII, a plaintiff must show that her workplace was both objectively and subjectively hostile. Harris v. Forklift Systems, 510 U.S. 17, 21 (1993). There is no dispute that the plaintiff subjectively believed that her workplace was

hostile in this case. The plaintiff must also show that the harassment was objectively "sufficiently severe or pervasive as to alter the conditions of the victim's employment and to create an abusive working atmosphere." R.R. Donnelly & Sons, 42 F.3d at 443. This standard also applies to racial discrimination suits under Title VII. Rodgers v. Western-Southern Life Ins. Co., 12 F.3d 668, 673 (7th Cir. 1993). Whether such an environment exists is a question of law. Brooms v. Regal Tube Co., 881 F.2d 412, 420 (7th Cir. 1989). Because Hardin's racial and gender discrimination claims rely on the same evidence, we analyze them together.

In reviewing Hardin's claims, we underscore that Anderson's conduct need not have been explicitly sexual or racial in order to create a hostile environment as the magistrate judge's opinion might appear to indicate. The complained of conduct must have either a sexual or racial character or purpose to support a Title VII claim. Malhotra v. Cotter & Co., 885 F.2d 1305, 1308 (7th Cir. 1989) (emphasis added).

Against this backdrop, we examine Anderson's actions committed within the limitations period. They include: allowing a door to close in Hardin's face, startling her by approaching her from behind in an electric cart without warning, cutting her off in the parking lot, and his persistent cursing and use of abusive language. Obviously, we agree with the district court that it is unfortunate that Ms. Hardin was subjected to such behavior. Nevertheless, we cannot conclude that these actions constituted sexual or racial harassment.

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Looking at Anderson's coarse language it is apparent that there was nothing inherently sexual or racial about his comments. Hardin alleges that Anderson said things to her such as "what the hell is going on?"; "what the hell are you doing?"; "get your head out of your ass"; "dumb motherfucker"; and "when the fuck are you going to get the product." These comments are much like ones in Galloway, which we viewed as in no way indicating that "women might be thought to be inferior to men in the workplace, or unworthy of equal dignity and respect." 78 F.3d at 1168; See also Johnson v. Hondo, Inc., 125 F.3d 408, 412 (7th Cir. 1997) (similar statements were held to be "simpl[e] expressions of animosity or juvenile provocation" rather than creating a hostile environment). Nor do these verbal outbursts implicate negative attitudes toward African-Americans. It cannot be said with any degree of certainty that the character of these remarks was discriminatory.

Moreover, the evidence demonstrates that Hardin was not singled out for abusive verbal treatment. Nothing indicates that Anderson's purpose in using disparaging language was to discriminate against women or black people. Hardin testified in her deposition that Anderson cursed at all employees on the line, white and black, male and female. This is supported by the depositions of nearly everyone who testified; it is undisputed that Anderson was a crude individual who treated all of his coworkers poorly. Thus, it would not be rational for a trier of fact to conclude that Anderson made the workplace less congenial for women or blacks than he did for men or whites. See Galloway, 78 F.3d at 1168.

Hardin also puts forward evidence of nonverbal harassment — the electric cart, door slamming and cutting off incidents — which were not directed at other employees. However, these events cannot be seen as having racial or gender overtones, and nothing suggests they were motivated by discrimination. Additionally, they were insufficiently severe to give rise to a hostile environment. As we recently noted, there is a "safe harbor for employers in which the alleged harassing conduct is too tepid or intermittent or equivocal to make a reasonable person believe that she has been discriminated against on the basis of her sex." Adusumilli v. City of Chicago, No. 98-1019, slip op. at 12 (7th Cir. December 28, 1998) (citation omitted). There, the court found no hostile environment where there was brief touching and poking by a coworker, as well as ambiguous comments directed at the plaintiff. Id. As the experienced magistrate judge here discussed in comprehensive detail, the facts of other cases, such as Baskerville v. Culligan Int'l Co., 50 F.3d 428 (7th Cir. 1995) and Saxton v. AT & T, 10 F.3d 526 (7th Cir. 1993) involved more intimidating and threatening actions, yet were not found to be sufficiently severe or pervasive to create a hostile working environment.

Because Hardin cannot establish that she was subjected to either gender or racial discrimination creating a hostile work environment, we need not go on to analyze whether S.C. Johnson's response to her complaints was negligent.

III.

The plaintiff's final claim is that the defendant's failure to remediate the situation between herself and Anderson

amounted to a violation of 42 U.S.C. sec. 1981. This Reconstruction-era statute, provides "[a]ll persons . . . shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens." 42 U.S.C. sec. 1981(a). Although a 1989 Supreme Court ruling held that sec. 1981's protections only applied to contract formation, Patterson v. McLean Credit Union, 491 U.S. 164 (1989), the Civil Rights Act of 1991 mooted Patterson, amending sec. 1981 to prohibit racial harassment on the job, and other forms of discrimination occurring after the formation of a contract. Gonzalez v. Ingersoll Mill. Mach. Co., 133 F.3d 1025, 1033 (7th Cir. 1998). The plaintiff contends that she was subject to both disparate treatment and a hostile work environment in violation of her contract with the defendant under the statute.

Hardin's disparate treatment claim is that the company would not have allowed a white person to be abused by Anderson in the same fashion she was. She asserts that the defendant's "racially motivated failure to respond adequately to the plaintiff's complaint" violated sec. 1981. Of course, she may not rely on her own subjective and unsubstantiated assertions to prove her case. Fairchild v. Forma Scientific, 147 F.3d 567, 574 (7th Cir. 1998). Instead, she must present evidence that the defendant failed to respond to her complaints, and that the failure was racially motivated. See Gonzalez, 133 F.3d at 1035. Hardin may offer either direct or indirect evidence to show racial discrimination. Id.; see also Eiland v. Trinity Hospital, 150 F.3d 747, 750 (7th Cir. 1998). She shows neither.

The only direct evidence of racism in the corpus of evidence before us is Anderson's alleged string of odious

statements to his then-girlfriend Brannon.[1] Although these statements are not time-barred for sec. 1981 purposes, we still have doubts about their possible admissibility because the proffered comments were not made in the workplace, and Hardin never heard them. However, even if we considered such statements, she would fare no better because Anderson was not a workplace decision maker. Thus, his purported statements cannot provide the basis for a determination of discrimination. Eiland, 150 F.3d at 750 (non-decision maker's racial animus not imputed to company without showing a sufficient nexus). Turning back to the facts before us, Hardin points to no direct evidence suggesting that the defendant acted upon racially discriminatory motives.

Neither can the plaintiff point to a similarly situated white employee who was treated more favorably by the defendant. See Gonzalez, 133 F.3d at 1035. The facts are undisputed that blacks and whites were treated with equal disrespect by Anderson. Anderson apparently behaved toward everyone in the same manner — he swore at them, ridiculed them and threw objects at or around them. Hardin's claim that S.C. Johnson responded more quickly to the needs of white employees is belied by the fact that she was accompanied by a white co-worker in at least one of her complaints to management, which ultimately led to Anderson being told to "tone it down." She fails to point to anything showing either that white coworkers' complaints

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1. Hardin does not specifically point to this evidence in the sec. 1981 context; nevertheless we do not wish to let the allegation of such statements remain unaddressed.

about Anderson were responded to with more alacrity, or their complaints about any similar incidents were treated more solicitously by the company. Because Hardin cannot make showings of discrimination — either through direct or indirect evidence — her disparate treatment claim fails.

We need not consider Hardin's hostile work environment claim under sec. 1981. In a submission to the district court, the plaintiff did not raise this argument, and may have even expressly disavowed such a claim. Because of this, the claim is waived, and we need not address its merits.[2] See Oates v. Discovery Zone, 116 F.3d 1161, 1168 (7th Cir. 1997) ("it is axiomatic that arguments not raised below are waived on appeal.").

IV.

For the reasons we have discussed, Katie Hardin is unable to show that a genuine issue of material fact exists on either her Title VII or 42 U.S.C. sec. 1981 claim. Accordingly, the district court's entry of summary judgment in favor of the defendant, S.C. Johnson, is Affirmed.

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2. Even if we examined the merits of the hostile environment claim, the plaintiff's argument would fail. In analyzing sec. 1981 claims, we apply the same standards as in Title VII cases. Johnson v. City of Fort Wayne, 91 F.3d 922, 940 (7th Cir. 1996). As we found above, Ms. Hardin has no underlying claim that a hostile environment existed under Title VII based on the evidence presented. Thus, the company cannot be held liable sec. 1981.

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN DATED AND FILED APRIL 1, 1998

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Case No. 95-C-944

KATIE R. HARDIN,

Plaintiff,

v.

S.C. JOHNSON & SON, INC.,

Defendant.

OPINION AND ORDER

The Plaintiff in this action, Katie R. Hardin, has been employed by the Defendant S.C. Johnson & Son, Inc. as an hourly production worker since 1972. In 1988, Hardin was transferred to line 374, a production line in the aerosol production area, at which time she claims she was subjected to sexual and racial harassment by Supervisor Ron Klimowicz and Line Chief Nels Andersen, in violation of Title VII and 42 U.S.C. § 1981. On March 9, 1998, United States Magistrate Judge Aaron E. Goodstein recommended that this court grant the Defendant's motion for summary judgment. The Plaintiff has filed a number of objections to the magistrate judge's recommendation. The court's review is *de novo*.

Appendix B

The Plaintiff first maintains that the magistrate judge erred in concluding that acts of harassment which did not occur within the limitation period are not actionable under Title VII. She has offered ample authority for the proposition that evidence of discriminatory conduct by an employer prior to the relevant limitation period may be admissible and relevant evidence of discriminatory intent as to conduct occurring within the limitation period. The magistrate judge, however, did not err in this respect but rather considered both the acts which the Plaintiff maintained constituted sexual or racial harassment within the limitation period and before the limitation period.

The Plaintiff also objects to the finding by the magistrate judge that the off-premises remarks made by Andersen about the Plaintiff lacked a sufficient nexus for the Plaintiff to establish a hostile work environment. The ultimate question is whether a triable issue of fact exists as to whether the Plaintiff, as a black woman, was "exposed to disadvantageous terms or conditions of employment to which members of the other [race or sex were] not exposed." *Oncale v. Sundowner Offshore Services, Inc.*, 18 S. Ct. 998, 1002 (1998) *quoting Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 25 (1993). The magistrate judge was correct in discounting the off-job comments made by Andersen. The court further rejects the Plaintiff's objection that the magistrate judge failed to consider whether management acted reasonably in response to Hardin's complaint because there was insufficient evidence that the Plaintiff was in fact subjected to racial or sexual harassment. The court, however, has reviewed the record and finds that management did act reasonably in addressing Hardin's

complaints, even though it may not have been the result that Hardin would have preferred.

Finally, the Plaintiff objects to the magistrate judge's conclusion that the employer's "mission statement" did not constitute a contract. As the magistrate judge noted, however, it is irrelevant whether the parties intended to be bound by the mission statement because both black and white employees were treated equally, albeit reprehensibly, by Andersen. The court accordingly adopts the recommendation of the magistrate judge in its entirety and ORDERS that the Defendant's motion for summary judgment IS GRANTED.

IT IS FURTHER ORDERED that the Clerk of Court enter final judgment in favor of the Defendant and against the Plaintiff who takes nothing.

Done and Ordered in Chambers at the United States Courthouse, Milwaukee, Wisconsin, this 1st day of April, 1998.

s/ Thomas J. Curran
Thomas J. Curran
United States District Judge

APPENDIX C — RECOMMENDATION TO DISTRICT JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN DATED AND FILED MARCH 9, 1998

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Case No. 95-C-944

KATIE R. HARDIN,

Plaintiff,

v.

S.C. JOHNSON & SON, INC.,

Defendant.

RECOMMENDATION TO DISTRICT JUDGE

On September 14, 1995, the plaintiff commenced this action in which she alleges that she was discriminated against in the terms and conditions of her employment because of her race and gender, contrary to Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000(e)-(2)) and 42 U.S.C. § 1981. This case was randomly assigned to this court for all pretrial processing. Jurisdiction is proper based upon the existence of federal questions. *See* 28 U.S.C. § 1331. Venue is proper in the Eastern District of Wisconsin. Because the parties did not consent to full magistrate judge jurisdiction, this court's jurisdiction is limited to issuing a recommendation with respect to the defendant's motion for

summary judgment, which is currently pending before this court.

I. BACKGROUND

The following constitutes a summary of the facts which are undisputed for purposes of the defendant's motion for summary judgment. *See* Local Rule 6.05. More detailed facts will be referred to as they arise during analysis of the defendant's motion. The plaintiff is a black female who resides in Wisconsin. (Complaint at ¶¶ 4, 8). Defendant S.C. Johnson & Son is a Wisconsin corporation with its principal place of business in Racine, Wisconsin. (James Fredrick Aff. at ¶ 2). The plaintiff has been employed by S.C. Johnson since 1972 as an hourly production worker. (Katie Hardin Dep. at pp. 10-12). In 1988, Ms. Hardin was transferred to line 374, an assembly line devoted to producing aerosol. (Hardin Dep. at pp. 12-13). Nels Anderson was the line chief for line 374 from the date the plaintiff transferred to the line until June, 1993. (Hardin Dep. at ¶ 16).

From 1988 to 1993, the plaintiff alleges that Andersen used vulgar language, such as "hell," "ass", "fuck" and "shit" on a nearly weekly basis. (Hardin Dep. at p. 114). Often, Andersen's coarse vocabulary was directed at the plaintiff. For instance, Hardin alleges that Andersen said to her: "what the hell is going on?"; what the hell are you doing?"; "shit"; "get your head out of your ass;" "dumb motherfucker;" you're doing that fucking right;" and "fuck you." (Hardin Dep. at pp. 113-114).

Appendix C

In 1989, Ms. Hardin, along with three other female workers, told their supervisor, Richard Konieczko, that Andersen treated the women on the line poorly, was disrespectful, cursed and threw objects while on the job. (Hardin Dep. at pp. 162-164). As a result, Konieczko monitored Andersen's actions and told him that there was no need for profanity in the workplace.

In 1993, Ms. Hardin alleges that a number of specific incidents occurred. She again complained about Andersen during an employee meeting, where she stated that Andersen cursed at the women on the line and was disrespectful. (Hardin Dep. at pp. 169-170). Ron Klimowicz, who replaced Konieczko as line supervisor, warned Andersen that such behavior was unacceptable and had to stop. (Hardin Dep. at p. 171). Later that week, Ms. Hardin told Klimowicz that Andersen was still swearing and that she told Andersen to stop touching her. Klimnowicz told Hardin that he would talk to Andersen and indicated that she should report any further incidents. (Hardin Dep. at pp. 172-173). Later in 1993, Klimowicz told Hardin and another female line worker that he should be made aware of any inappropriate behavior displayed by Andersen to make sure that all problems were documented. (Klimnowicz Dep. at pp. 31-32).

In March, 1993, the plaintiff spoke to Sherry Johnson, S.C. Johnson's human resource manager, and complained about Andersen's profane language, that he called her a liar, and that he did not want her on the line. (Johnson Dep. at p. 12). Hardin also told Johnson that men on the line were not treated with such disrespect. (Johnson Dep. at p. 22).

Johnson told Hardin that the company prohibited sexual harassment and explained that Hardin needed to do to file a written complaint. (Hardin Dep. at p. 181). Johnson also held a meeting with Klimowicz to discuss Andersen's behavior. On March 11, 1993, Johnson met with Andersen, where he admitted that he used foul language and that he suggested to Hardin that she move to another line. (Johnson Dep. at p. 52).

Also, in March, 1993, the plaintiff informed a supervisor that Andersen's wife worked on the same production line as Andersen, although S.C. Johnson's policy prohibits spouses from working on the same production line. (Hardin Dep. at pp. 115-116). After Andersen's wife was removed from the line, Andersen confronted Hardin about the matter but Hardin indicated that she did not know what Andersen was referring to. Andersen then called her a liar and asked, "What the hell do you think you are doing? All you do is cause trouble on the line." (Hardin Dep. at pp. 125-126). On another occasion, Andersen told the plaintiff, "I wish you would do us all a favor and go to another line." (Hardin Dep. at p. 116). Andersen also asked the plaintiff "where the hell" she was when he felt she took a long break, and "what the hell were you doing, don't you know how to do your job," when Andersen felt the plaintiff did not perform satisfactorily. (Hardin Dep. at pp. 116, 134-135).

Then in March, 1993, the plaintiff filed a written complaint with the Human Resources Department and complained that Johnson sexually harassed her. (Hardin Dep., Ex. 7). The complaint states that "the reason I am accusing Nels of sexually harassing me, is because he only

harasses the women and not the men, that work on the line." (*Id.*). Specifically, Hardin claimed that Andersen swore at her, that he wished she would move to another line, and that he accused her of being a liar. (*Id.*). The complaint was delivered to Steve Price, Ms. Johnson's supervisor, who subsequently warned Andersen that such conduct would not be tolerated. (Hardin Dep. at p. 183). At this time, Andersen's cursing stopped after Hardin's formal complaint was received by S.C. Johnson's management, who told Andersen to stop such behavior and to avoid the plaintiff unless he absolutely had to talk to her. (Hardin Dep. at p. 122).

The plaintiff's allegations of sexual harassment are not limited to Andersen's coarse vocabulary. Ms. Hardin also states that, beginning in 1988, Andersen sexually harassed when he frequently touched her on the neck, shoulders and, on one occasion, touched her feet. (Hardin Dep. at pp. 143-145).

In 1995, Ms. Hardin complained to James Fredrick, who became human resources director in 1995, that she perceived she was treated differently by Andersen because she is a black woman. (Fredrick Dep. at p. 8). Fredrick then interviewed other black employees to determine whether they had similar concerns. (Fredrick Dep. at pp. 13-14). Fredrick states that none of the black employees he spoke with expressed a belief that they were discriminated against. (Fredrick Dep. at p. 26).

In February, 1995, the plaintiff complained to William Perez, Johnson's president, that Andersen harassed her, that

she had filed a complaint, and that the company did not take action. (Hardin Dep. at p. 214). Perez spoke to Fredrick about Hardin's complaints and decided to move Andersen to another production line. (Fredrick Aff. at ¶ 16). However, on June 3, 1995, Andersen was assigned to work an overtime shift on line 374. Ms. Hardin chose not to come to work that day. (Hardin Dep. at p. 240). On June 5, 1995, the plaintiff complained to Jim Potochick, the plant manager, that Andersen was assigned to her line. (Hardin Dep. at pp. 241-242). Ms. Hardin also complained that Andersen startled her when he came from behind her in an electric cart without warning, that he let a door slam in front of her, and that he cut her off in the parking lot. (Hardin Dep. at pp. 246-247). Fredrick told Hardin that she would not be permanently assigned to work with Andersen, and that if in a rare circumstance Andersen was assigned to work with Hardin, she would be notified in advance and provided the option of not working with Andersen. (Fredrick Aff. at ¶ 18).

On June 13, 1995, the plaintiff filed a complaint with the Wisconsin Department of Industry, Labor and Human Relations' Equal Rights Division [hereinafter "ERD"]. Ms. Hardin complained that she had experienced racial and sexual discrimination since 1993. (Plaintiff's Ex. S at p.1). On September 8, 1995, the plaintiff received a notice of right to sue letter from the ERD.

II. ANALYSIS

The defendant moves for summary judgment under Fed. R. Civ. P. 56. S.C. Johnson argues that the undisputed facts

show that: 1) it is entitled to summary judgment on Andersen's Title VII claims because the alleged misconduct was not sexual or racial in nature and because Andersen's alleged misconduct is not sufficiently severe or pervasive to constitute an actionable hostile work environment; 2) even if Andersen's acts presented a hostile work environment for Hardin based or her race and gender, S.C. Johnson is not liable because it reasonably responded to the plaintiff's complaints; and 3) it is entitled to summary judgment on Hardin's § 1981 claim because Andersen's actions were not racially motivated and Hardin was not subjected to treatment that was not imposed upon white employees. The defendant contends that summary judgment is inappropriate because women, specifically black women, were singled out by Andersen for abuse and S.C. Johnson did not take adequate measures to discipline Andersen or to prevent his conduct from recurring.

A motion for summary judgment will be granted when there are no genuine issues as to material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). As provided under Rule 56(c), only "genuine" issues of "material" fact will defeat an otherwise "proper" motion for summary judgment. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). "[M]aterial" facts are those facts which, under the governing substantive law, "might affect the outcome of the suit." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute over such material facts is "genuine" if the evidence is such that a reasonable trier of fact could find in favor of the nonmoving party. *Anderson*, 477 U.S. at 248.

The movant bears the burden to establish that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Rule 56(c); *see Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159 (1970); *see also Celotex Corp. v. Catrett*, 477 U.S. at 323 (the moving party has the responsibility of informing the court of portions of the record or affidavits that demonstrate the absence of a triable issue). In addition, the moving party may meet its burden to show an absence of a material issue by demonstrating "that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp.*, 477 U.S. at 325. Any doubt as to the existence of a genuine issue for trial is resolved against the moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 255; *Cain v. Lane*, 857 F.2d 1139, 1142 (7th Cir. 1988); *Spring v. Sheboygan Area School Dist.*, 865 F.2d 883, 886 (7th Cir. 1989). If the moving party meets its burden, the nonmoving party then has the burden to present specific facts showing that there is a genuine issue of material fact. *Matsushita Elec. Inus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986).

1. Title VII Claims

A. Statute of Limitations

Before discussing the merits of the plaintiff's allegations of discrimination, the court must determine whether Hardin may allege facts in support of her claims which occurred more than 300 days before she filed her complaint with the ERD. The defendant avers that the statute of limitations for Title VII actions prevents Hardin from alleging facts which occurred before August 16, 1994. The

plaintiff contends that because she alleges Andersen's behavior was continuous from 1988 to 1995, any act which occurred after 1995 may be raised to support her Title VII claims.

The statute of limitations for filing a discrimination charge under Title VII with the federal Equal Employment Opportunity Commission or appropriate state agency is 300 days from the date of the allegedly discriminatory act. 42 U.S.C. § 2000e-5(e). However, equitable principles of limitations law, such the discovery doctrine, equitable estoppel and equitable tolling, "excuse the claimant from having to file before it is feasible to do so, and these principles apply to cases brought under Title VII." *Galloway v. General Motors Service Parts Oper.*, 78 F.3d 1164, 1166 (7th Cir. 1996). If a Title VII claimant "sues as soon as the harassment becomes sufficiently palpable that a reasonable person would realize she had a substantial claim under Title VII," then she may "allege as unlawful conduct the entire course of conduct that in its cumulative effect has made her working conditions unbearable." *Id.* However, the plaintiff may not base her case on conduct that occurred outside the limitations period unless it is "unreasonable to expect the plaintiff to sue before the statute ran on that conduct, as in a case in which the conduct could constitute, or be recognized, as actionable harassment only in the light of events that occurred later, within the period of the statute of limitations." *Id.* at 1167.

The plaintiff claims that Andersen began directing rude and offensive behavior toward her in 1988. Such conduct included coarse language, accusations of lying, touching,

and statements that the plaintiff should transfer to another line. Hardin argues that because Andersen committed such acts within and outside the limitations period, a continuing violation is established for which she should be allowed to present evidence from the violation's origin.

However, "a plaintiff who has been the victim of a long chain of events cannot introduce the whole chain if at any point along the line she would have been aware of her injury but failed to file." *Alvey v. Rayovac Corp.*, 922 F.Supp. 1315, 1326-27 (W.D. Wis. 1996) (citing *Galloway*, 78 F.3d at 1166-67). Under such circumstances, the plaintiff may only sue for acts of harassment which occurred within the limitations period. *Id.* at 1327.

During her deposition, Hardin testified that she believed Andersen began harassing her because of her sex and race in 1988. (Hardin Dep. at p. 65). In 1993, the plaintiff filed a complaint with S.C. Johnson's human resources department alleging that she was sexually harassed by Andersen. Assuming that Andersen's conduct constitutes a chain of related events which amount to sexual and racial harassment, Hardin perceived such conduct as harassment during 1993, and more than likely as early as 1988. Thus, because Hardin believed during the chain of events that Andersen harassed her, any acts of harassment which did not occur within the limitations period are not actionable under Title VII. As the plaintiff filed her complaint with the ERD on June 12, 1995, only acts which occurred after August 16, 1994 are actionable under Title VII. However, because Wisconsin's six-year statute of limitations for injuries to character and rights, § 893.53, Wis. Stats., applies

to § 1981 actions, the plaintiff may sue for any acts which occurred after June 12, 1989 under her § 1981 claim. *See Saldivar v. Cadena*, 622 F.Supp. 949, 956 (W.D. Wis. 1985).

B. Hostile Environment Sexual Harassment

The defendant moves for summary judgment with respect to Hardin's hostile environment sexual harassment claim, arguing that the acts for which the plaintiff complains did not create a hostile environment as a matter of law. The plaintiff, on the other hand, contends that because Andersen verbally abused women more than men, a hostile environment was created.

Title VII's prohibition against discrimination based on sex includes claims of sexual harassment. *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 64 (1986). Sexual harassment may take two forms — quid pro quo or hostile work environment. *Id.* Hardin only alleges hostile work environment.

The existence of a hostile work environment is a question of law. *Brooms v. Regal Tube Co.*, 881 F.2d 412, 420 (7th Cir. 1989). For harassment to be actionable as creating a hostile work environment, it must be "sufficiently severe or pervasive as to alter the conditions of the victim's employment and to create an abusive working atmosphere." *Doe v. R.R. Donnely & Sons Co.*, 42 F.3d 439, 443 (7th Cir. 1994). Whether an environment is hostile depends on the totality of the circumstances, such as the frequency of the discriminatory conduct, its severity, whether it is

physically threatening or humiliating — or a mere offensive utterance, and whether it unreasonably interferes with an employee's work performance. *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 23 (1993). These factors are evaluated from a subjective and objective viewpoint — the effect the conduct actually had on the plaintiff and the impact the conduct would likely have on a reasonable employee in similar circumstances. *Saxton v. AT&T Co.*, 10 F.3d 526, 534 (7th Cir. 1993). To be actionable under Title VII, the conduct must create an environment that a reasonable person would find hostile or abusive *and* the victim must subjectively perceive the environment to be abusive. *Harris*, 510 U.S. at 21-22. Proceeding under this dual test, and for the purpose of summary judgment, the court will accept that Hardin subjectively perceived the environment at S.C. Johnson to be hostile and abusive. However, the court must also be satisfied that the environment was objectively hostile and abusive in order to allow Hardin's claim to proceed past the summary judgment stage.

Based on the allegations submitted to the court, Mr. Andersen engaged in reprehensible conduct — one does not have to be a prude to find offensive the language to which he subjected the plaintiff. There is no excuse for using such vulgar and demeaning language with co-employees, but the present motion does not test Anderson's conduct from a standpoint of civility; it tests such behavior against the legal standard established for sexual harassment. An analysis of the alleged facts discloses that Mr. Andersen is not a sexual harasser, because the evidence does not indicate that the actions he took against Ms. Hardin were based on her gender. In other words, the undisputed facts do not show

that, but for the fact that the plaintiff is a woman, she would not have been subjected to Andersen's crude comments and threatening actions. Rather, Andersen's comments were gender-neutral insults, which are not actionable as sexual harassment.

The acts Andersen committed within the limitations period include allowing a door to the plant to close in the plaintiff's face, startling the plaintiff by approaching her from behind without warning in an electric cart, and cutting her car off in the company parking lot with his car. While Andersen confirms Edmund Burke's fear, albeit some 200 years later, that the age of chivalry is gone, such acts do not constitute sexual harassment because they are not gender-based offenses. *See* Edmund Burke, *Reflections on the Revolution in France* 115 (1790) ("The age of chivalry is gone. — That of sophisters, economists, and calculators, has succeeded; and the glory of Europe is gone.")

Even when conduct which allegedly occurred outside the limitations period is considered, Hardin fails to present a claim for hostile environment sexual harassment. Starting in 1988, Hardin alleges that Andersen threw tools and subjected her to the following profane language: "what the hell is going on?"; "what the hell are you doing?"; "shit;" "get your head out of your ass;" "dumb motherfucker;" "when the fuck are you going to get the product?" "you're doing that fucking right;" and "fuck you." Again, while Andersen is certainly not a choir boy, such evidence does not indicate that he is a sexual harasser because the coarse language was gender-neutral. *See Vandeventer v. Wabash National Corp.*, 887 F. Supp. 1178, 1181 n.2 (N.D. Ind.

1995) (plaintiff did not present prima facie case for sexual harassment where he was subjected to epithets with sexual component, but the epithets were not directed at him because of his gender).

In this respect, *Galloway v. General Motors Service Parts Oper.*, 78 F.3d 1164 (7th Cir. 1996), is instructive, where the Seventh Circuit held that the repeated use of the term "sick bitch" did not constitute sexual harassment. The *Galloway* plaintiff alleged that a coworker continuously referred to her as a "sick bitch" for four years, in reference to the plaintiff's psychiatric disorder. *Galloway*, 78 F.3d at 1165. On one occasion, the coworker also made an obscene gesture to the plaintiff and told her to "suck this, bitch." *Id.* While the court noted that heterosexual males are rarely referred to as "bitches," it observed that the word does "not necessarily connote some specific female characteristic . . . it does not draw attention to the woman's sexual or maternal characteristics or to other respects in which women might be thought to be inferior to men in the workplace, or unworthy of equal dignity and respect." *Id.* at 1168. Similarly, Andersen's acts, while insulting, were unrelated to the plaintiff's gender.

Hardin argues that the cumulative impact of Andersen's conduct, coupled with its differential impact upon women, created a hostile working environment. However, Hardin testified that Andersen cursed at everybody who worked on his line, including men. (Hardin Dep. at pp. 30-31, 118-119). Because the undisputed facts show that Andersen was equally disrespectful to men and women, the plaintiff cannot show that Andersen verbally abused her because she

is a woman, a condition precedent for establishing a prima facie case of sexual harassment. *See Galloway*, 78 F.3d at 1168 (not rational for trier of fact to conclude that male worker made workplace less congenial for women than for men if worker refers to a woman as a "dumb bitch" and to a man as a "dumb bastard").

Citing *Steiner v. Showboat Operating Co.*, 25 F.3d 1459 (9th Cir. 1994), *cert.denied*, 513 U.S. 1082 (1995), the plaintiff argues that the court must consider what is offensive and hostile to a reasonable woman, regardless of whether Andersen treated male and female employees alike. In *Steiner*, the plaintiff appealed the district court's grant of summary judgment for the defendant where the facts established that the plaintiff's supervisor was abusive to men and women alike, but his abusive treatment and remarks toward women were of a sexual and gender-specific nature (the supervisor referred to her as a "dumb fucking broad," "cunt" and "fucking cunt" and told a co-female employee that he would "hate to terminate someone with big boobs." *Id.* at 1461-1462. The Ninth Circuit held that the district court erred when it accepted the defendant's argument that the plaintiff's supervisor was equally abusive to men and women: "The numerous depositions of employees reveal that [the supervisor] was indeed abusive to men, but that his abuse of women was different. It relied on sexual epithets, offensive, explicit references to women's bodies and sexual conduct." *Id.* at 1463. The court then noted that even if the supervisor used sexual epithets against males, a court must consider what is offensive and hostile to a reasonable woman. *Id.* at 1464.

Appendix C

This court does not dispute that it must consider what a reasonable woman would find hostile and abusive. Certainly, the Supreme Court's mandate that courts consider the subjective and objective elements of a sexual harassment claim requires such an analysis. However, to be actionable as sexual harassment, the conduct to which the court evaluates the reasonable woman's response must be based on her gender. Abusive conduct which is unrelated to the victim's gender is not actionable, and that distinguishes the instant case from *Steiner*. Terms such as "shit," "hell," and even "motherfucker" are not gender specific, unlike "broad" and "cunt." As the Seventh Circuit recently held in *Johnson v. Hondo, Inc.*, No. 96-3492 (7th Cir. Aug. 28, 1997), certain expressions which refer to sexual acts, such as "fuck me," "kiss my ass," and "suck my dick," usually have no connection with the sexual acts to which they refer. "Ordinarily, they are simply expressions of animosity juvenile provocation . . . ." *Id.*, slip op. at 8. Moreover, unlike in *Steiner*, there is no evidence that Andersen's comments were sexual in nature. In *Steiner*, the defense argued that the supervisor was equally abusive to men and women failed because his abuse was clearly sexual in nature, unlike the abuse emanating from Andersen.

The plaintiff cites the case of *Robinson v. Jacksonville Shipyards, Inc.*, 760 F.Supp. 1486 (M.D. Fla. 1991), to argue that it is irrelevant if Andersen's conduct lacked sexually explicit content as long as such conduct is disproportionately directed at women. Of course, behavior need not be sexual in nature to constitute sexual harassment. Rather, as held in *Robinson*, the plaintiff need only establish that but for her sex, she would not have been the object of harassment.

Id. at 1522. Thus, the harassment need not be sexual per se, such as offers to engage in sexual conduct; however, the harassment must be related to the employee's gender, such as referring to an employee as a "dumb broad," which the plaintiff fails to demonstrate.

Hardin also alleges that Andersen frequently touched her on the neck and shoulders between 1988 and 1993. Of course, Hardin may not raise such acts as a basis for her sexual harassment claim because they occurred outside the limitations period. However, even if such acts occurred within the limitations period, they were not sufficiently severe or pervasive so as to alter the conditions of Hardin's working environment and create an abusive working atmosphere.

In its recent cases, the Seventh Circuit has set the bar for conduct to qualify as sexual harassment much higher than what is alleged in this case. For example, regarding physical acts, the conduct must be far more egregious than touching the shoulder and neck for it to constitute sexual harassment. In *Baskerville v. Culligan International Co.*, 50 F.3d 428, 430 (7th Cir. 1995), the plaintiff complained that her boss, over a period of seven months, called her "pretty girl," made a grunting sound when she wore a leather skirt, told the plaintiff that her presence made the room hot, told the plaintiff that "all pretty girls run around naked" when employees are called to attention on the company loudspeaker, and made a hand motion to the plaintiff to suggest masturbation. However, the court held that no actionable hostile environment was created because the incidents were isolated and infrequent, the boss did not

touch the plaintiff, he did not invite her to have sex with him or go on a date with him, he did not expose himself, and he did not show her dirty pictures. *Id.* at 431. The court acknowledged a line, albeit difficult to draw, between actionable sexual harassment — sexual assaults, other uninvited amorous or hostile physical contact, uninvited sexual solicitations, intimidating words and acts, obscene language or gestures, and pornographic pictures; and nonactionable behavior — "the occasional vulgar banter, tinged with sexual innuendo, of coarse or boorish workers." *See id.* at 430. In the instant case, Andersen — the alleged harasser — did not threaten Hardin, did not expose himself to Hardin, and did not invite Hardin on a date or suggest they have sexual relations. Even if Andersen frequently touched Hardin on the shoulders and neck, there is no evidence that Andersen touched her with amorous intent. Although Andersen used vulgar language toward Hardin, his language was not infused with sexual innuendo.

In *Saxton v. AT&T*, 10 F.3d 526 (7th Cir. 1993), the plaintiff's supervisor placed his hand on the plaintiff's leg and rubbed his hand along her upper thigh after work at a nightclub. The plaintiff removed his hand, told him to stop, and told him that he could get in trouble for such conduct. When they left the nightclub, the supervisor pulled the plaintiff into a doorway and kissed her until she pushed him away. The plaintiff told her supervisor to not approach her again and he apologized. Three weeks later, the supervisor invited the plaintiff to lunch, drove to an arboretum, got out of the car to take a walk and " 'lurched at her from behind some bushes as if to grab her. *Id.* at 528. The appeals court affirmed the district court's grant of

summary judgment, holding that "[a]lthough [the supervisor's] conduct was undoubtedly inappropriate, it was not so severe or pervasive as to create an objectively hostile work environment." *Id.* at 534. The court focused on the fact that the incidents were isolated and the supervisor stopped the activity after being rejected twice by the plaintiff. *See id.* In the instant case, although the plaintiff alleges that Andersen touched her frequently, he stopped touching her after she complained about such conduct. And, again, the touching which did occur was far more innocuous than the activity which did not rise to the level of actionable sexual harassment in *Saxton*.

Finally, in *Weiss v. Coca-Cola Bottling Co. of Chicago*, 990 F.2d 333 (7th Cir. 1993), the plaintiff alleged that over a five-month period her supervisor asked her for dates, called her a "dumb blonde," put his hand on her shoulder several times, placed "I love you" signs in her work area, and attempted to kiss her twice at work and once in a bar. The appeals court upheld the district court's grant of summary judgment, noting that the incidents were relatively isolated and were not sufficiently serious to constitute sexual harassment. By contrast, the acts alleged in the instant case were not even implicitly sexual in nature, unlike the acts alleged in *Weiss* which still did not establish actionable sexual harassment.

To conclude, because the plaintiff fails to establish that she was subjected to an objectively hostile environment, the court will recommend that the defendant's motion for summary judgment on the plaintiff's hostile environment sexual harassment claim be granted.

Appendix C

C. Hostile Environment Racial Harassment

The defendant also moves for summary judgment with respect to Hardin's Title VII claim for hostile environment racial harassment, contending that Andersen's conduct was not racially motivated, the conduct was not sufficiently pervasive and severe, and the defendant acted reasonably in response to her complaints. The plaintiff, while focusing her response with regard to racial discrimination on her § 1981 claim, appears to argue that summary judgment is inappropriate because Hardin was singled out for disrespectful treatment by Andersen.

"Title VII . . . prohibits an employer from engaging in racial harassment that creates a hostile or offensive working environment." *Rodgers v. Western-Southern Life Ins. Co.*, 12 F.3d 668, 673 (7th Cir. 1993). " 'The question in each case is whether the quantity and frequency of the [racial and ethnic slurs] are sufficient to state a violation of Title VII.' " *Daniels v. Essex Group, Inc.*, 937 F.2d 1264, 1270 (7th Cir. 1991) (quoting *Nazaire v. Trans World Airlines, Inc.*, 807 F.2d 1372, 1380-81 (7th Cir. 1986)). As with alleged hostile environment based on sexual harassment, a hostile environment based on racial harassment is also to be evaluated from a subjective and objective perspective, requiring a court to consider both the "likely effect" of the conduct on a "reasonable" person and the "actual" effect upon the person bringing the claim. *Rodgers*, 12 F.3d at 674. As with plaintiff's sexual harassment claim, the court will assume that Hardin subjectively perceived that a hostile environment was created based on her race, although based upon the facts presented, this is a more difficult leap to

make than with the sexual harassment claim. Turning to an analysis of the objective prong of a racial harassment claim, the court may consider the nature of the alleged harassment, the background and experience of the plaintiff, her coworkers and supervisors, totality of the work area's physical environment, " 'the lexicon of obscenity that pervaded the environment of the workplace,' " and the reasonable expectation of the plaintiff upon voluntarily entering that environment. *Daniels*, 937 F.2d at 1274 (quoting *Brooms v. Regal Tube Co.*, 881 F.2d 412, 419 (7th Cir. 1989)).

The plaintiff raises the same allegations in support of her racial harassment claim as were used to support her sexual harassment claim. Thus, the only acts which occurred within the limitations period are when Andersen cut the plaintiff off in a parking lot, when Andersen startled the plaintiff with an electric cart, and when Andersen shut a door in the plaintiff's face. However, no evidence exists that such acts were taken because of the plaintiff's race. For instance, the acts were not accompanied by a racial slur and no evidence exists that Andersen singled out the plaintiff for such treatment based on her race. In fact, Hardin testified that she never heard Andersen utter a racial epithet. (Hardin Dep. at p. 161).

Again, when acts are considered that occurred outside the limitations period, such as the profane language Andersen directed at the plaintiff, the plaintiff still fails to present a claim for hostile environment racial harassment because such remarks were not racially derogatory. Terms such as "shit," "hell," and "motherfucker" are race-neutral

and Title VII does not protect employees, regardless of their race, from race-neutral insults. As held by the Seventh Circuit, "not every act of harassment of a person who happens to belong to a racial minority or other protected group violates the statute. A member of such a group has no right to have a more congenial working environment than a white male, and therefore he can complain only about harassment that is discriminatory in character or purpose." *Malhotra v. Cotter & Co.*, 885 F.2d 1305, 1308 (7th Cir. 1989). Moreover, the plaintiff testified that Andersen directed profanity at both black and white employees. (Hardin Dep. at p. 32).

Hardin offers an affidavit from Rose Brannon, Andersen's girlfriend from 1993 to 1994, who states that she routinely heard Andersen refer to the plaintiff as a "stupid black bitch," "stupid nigger bitch," "fucking black bitch," and a "black cunt." (Brannon Aff. at ¶¶ 25, 34). However, Brannon indicates that such statements were made off the work premises. Such off-premise remarks that Andersen made to Brannon lack sufficient nexus for plaintiff to establish a hostile work environment. *See Daniels*, 937 F.2d at 1270 (Title VII guarantees employees the right to *work* in an environment free from discriminatory intimidation, ridicule and insult). To conclude, because Hardin fails to present any evidence that she was subject to racial harassment in the workplace, the court will recommend that the defendant's motion for summary judgment regarding plaintiff's Title VII racial harassment claim should be dismissed.

In view of the fact that Hardin has not established that a hostile environment based on racial or sexual harassment

was created, it is not necessary to address the defendant's contention that management acted reasonably in response to Hardin's complaints.

2. Section 1981 Claim

Lastly, the defendant moves for summary judgment regarding the plaintiff's § 1981 claim for racial discrimination. As with Hardin's Title VII claim, the defendant argues that it is entitled to summary judgment because any harassment Hardin endured was not racially based or motivated.

Section 1981 provides that "[a]ll persons . . . shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens." 42 U.S.C. § 1981(a). "[T]he term 'make and enforce contracts' includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981(b). To establish a claim under § 1981, the plaintiff must show: 1) that she is a member of a racial minority; 2) that the defendant intended to discriminate on the basis of her race; and 3) that the discrimination concerned an activity enumerated in the statute; in this case, the enjoyment of all terms, conditions and privileges of the contractual relationship. *See Morris v. Office Max, Inc.*, 89 F.3d 411, 413 (7th Cir. 1996).

Hardin states that, unlike her Title VII claim which was based on racial harassment, her § 1981 race discrimination claim is based upon her allegation that the defendant

breached its promise to the plaintiff, as stated in its mission statement, that she would be free from threats, intimidation, profanity and rude insults in the workplace; while similarly situated white employees enjoyed a working environment free from disrespect. Thus, the plaintiff contends that she did not enjoy the same fruits, privileges and benefits as whites in the workplace.

Whether the plaintiff may assert a § 1981 claim based on the terms of S.C. Johnson's mission statement depends upon whether the mission statement is contractually binding between the plaintiff and defendant. This is a question of state law. *See Border v. City of Crystal Lake*, 75 F.3d 270, 273 (7th Cir. 1996) (whether an employee handbook creates a contractual property right is a question of state law). Wisconsin law recognizes that the terms of an employee handbook, and presumably an employer's mission statement which is communicated to employees, can create an enforceable express contract or implied contract. *Garvey v. Butler*, 146 Wis.2d 281, 289, 430 N.W.2d 616, 619 (Ct. App.), *rev. denied*, 147 Wis.2d 889, 436 N.W.2d 30 (1988); *Ferraro v. Koelsch*, 124 Wis.2d 154, 164, 368 N.W.2d 666, 671 (1985). However, the mere existence of an employee handbook does not automatically render its terms contractual. *Ferraro*, 124 Wis.2d at 169, 368 N.W.2d at 674. Both implied and express contracts require a mutual meeting of the minds and an intent to contract, which is a question of fact. *Garvey*, 146 Wis.2d at 287, 289, 430 N.W.2d at 619.

No evidence is offered to show whether the parties intended the mission statement to have contractual

implications. The plaintiff does not indicate whether she perceived the mission statement as a contract, and the defendant does not state whether it intended the mission statement to constitute a contract. However, even if the mission statement is contractual, summary judgment is appropriate because the facts are undisputed that blacks and whites were treated with equal disrespect by Andersen. As noted above, Andersen treated white employees with the same disrespect as he treated Hardin — he swore at them, ridiculed them and threw objects in their presence.

Hardin states that she and Leevora Perry, another black employee, complained "vigorously" to S.C. Johnson management about how she was treated on the assembly line but to no avail. However, Hardin neglects to mention that Marsha Russell, who is white, and Marian Barootian, who is Hispanic, also accompanied Hardin and Perry to complain about their treatment. (Hardin Dep. at pp. 163-164). Thus, Hardin does not present evidence to show that white workers received preferential treatment when they complained to management about Andersen's behavior.

Hardin also alleges that a white worker, Janice Barker, received a more immediate response to her complaint regarding coarse language. Barker complained to James Potochick that she heard another employee speak vulgarity over a company radio. (Potochick Aff. at p. 70). Potochick states that he then reminded the line 366 employees at a team meeting that they should not curse given that statements may be heard over the company radio. By contrast, Hardin alleges that Potochick did nothing when she complained about Andersen's language. However, the

undisputed evidence shows that Hardin did not complain to Potochick about Andersen's behavior. Moreover, the behavior that Barker complained about was factually distinct from the behavior that Andersen directed toward Hardin; Andersen's comments were made in relative privacy compared to the comments Barker heard on the company radio.

The plaintiff offers a litany of alleged discriminatory acts which occurred to other black employees at S.C. Johnson — she states that black workers were denied equal training and pay, that black workers were prevented from competing for promotions, and that blacks were discriminated against in overtime. Such other discriminatory acts are not part of plaintiff's complaint, and are now the subject matter of another lawsuit plaintiff and a number of her co-workers have brought against the defendant. Accordingly, evidence of discrimination which was directed at other employees cannot be used to support the plaintiff's § 1981 claim for discrimination. *See Sample v. Aldi, Inc.*, 61 F.3d 544, 551 (7th Cir. 1995) (plaintiff must show link between alleged discrimination against coworkers with employment actions the plaintiff is challenging).

In her brief in opposition to summary judgment, the plaintiff also alleges that she was discriminated against in overtime assignments. However, upon reviewing the plaintiff's deposition, her complaint regarding overtime assignments was based on the fact that Andersen's wife worked on the line when Hardin was working overtime. Thus, the plaintiff's complaint regarding overtime is more akin to an allegation of nepotism than to an allegation of racial discrimination.

To conclude, even if the defendant's mission statement created a contractual right to work in an environment free from threats, intimidation and profanity; because Andersen's actions toward Hardin were not racially motivated and because whites were similarly mistreated by Andersen, the plaintiff does not establish that the defendant failed to realize its mission statement with respect to Hardin because she is black. The plaintiff fails to present a prima facie case for race discrimination under § 1981, and the court will recommend that the defendant's motion for summary judgment on that claim.

IT IS THEREFORE RECOMMENDED that the defendant's motion for summary judgment be **granted**.

The Clerk of Court is directed to reassign this case to a district judge in order to consider this recommendation and any objections thereto, and to schedule this case for any further proceedings, all discovery having been completed.

Pursuant to Local Rule 13.03(c), any objection to this recommendation must be filed in writing with the Clerk of Court in duplicate within ten days from the date this recommendation is received. Failure to file an objection within the specified time waives the right to appeal the district court's order on all factual and legal issues.

Dated at Milwaukee, Wisconsin, this 9th day of March, 1998.

s/ Aaron E. Goodstein
AARON E. GOODSTEIN
U.S. MAGISTRATE JUDGE

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED MARCH 15, 1999

UNITED STATES COURT OF APPEALS
For The Seventh Circuit
Chicago, Illinois 60604

March 15, 1999

HON. JOEL M. FLAUM, Circuit Judge
HON. FRANK H. EASTERBROOK, Circuit Judge
HON. DIANE P. WOOD, Circuit Judge

No. 98-2058

KATIE R. HARDIN,

Plaintiff-Appellant,

v.

S.C. JOHNSON & SON, INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Wisconsin

No. 95 C 0944

Thomas J. Curran, Judge.

Appendix D

ORDER

On consideration of the petition for rehearing and suggestion for rehearing en banc filed in the above-entitled case on February 11, 1999, by plaintiff-appellant, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby DENIED.